Brief for Appellant in Opposition to Motion to Advance.

Supreme Court of the United States.

JOHN A. BENSON,
Appellant,

against

WILLIAM HENKEL, United States Marshal,
Appellee.

On December 30, 1903, the above named appellant was arrested in the City of New York upon a complaint, consisting of a certified copy of an indictment found by the Grand Jury in the District of Columbia. From the time of the arrest until May 4, 1904, an examination proceeded before a United States Commissioner in the Southern District of New York. At the conclusion of the examination, on May 4, 1904, the defendant was committed by the United States Commissioner to await the action of the United States District Judge upon an application to be made by the United States Attorney for a warrant of removal under Section 1014, U. S. R. S., to the District of Columbia for trial. On the same day writs of *habeas corpus* and *certiorari* were granted by the United States Circuit Court for the Southern District of New York upon the application of this appellant. After argument, said writs were dismissed and the prisoner remanded to custody, and from the order entered on

the 31st day of May, 1904, dismissing the writs, this appeal is prosecuted. The Solicitor General, on behalf of the United States, now moves to advance the case on the docket of this Court for an early hearing.

I.

No facts are shown or exist requiring that the case be advanced.

The indictment purports to charge the appellant with the crime of bribery under Section 5451 of the United States Revised Statutes. This statute declares criminal the payment of money to any officer of the United States with the intent to induce him to do or omit to do any act in violation of his lawful duty. The indictment charges that on various dates in the year 1903 this appellant paid specified sums of money to two different employes of the Department of the Interior, in the General Land Office, for the purpose of inducing them to reveal to the appellant, when the same should come into their hands and knowledge, the contents of the report of certain special agents of the Department of the Interior who were engaged in an investigation of the appellant's transactions with the Government in relation to public lands.

It is contended by the appellant that the indictment charges no crime or offense against the United States. That the facts stated in the indictment and appearing in evidence do not disclose that any violation of duty on the part of the employes of the Department was involved; that, on the contrary, it clearly appears from the entire case that the alleged facts did not and could not involve any violation of their lawful duty, within the meaning of Section 5451, and that the appellant is detained

in custody and held for removal without due process of law. Several other contentions are made in behalf of the appellant involving the application of the Federal Constitution and the construction of Federal statutes.

This application is apparently made under Rule 26, Subdivision 3, providing that criminal cases may be advanced by leave of the Court on motion of either party. It was held shortly after the promulgation of this rule that motions to advance cases under the rule must state facts showing that the operations of the Government will be embarrassed by delay in the decision of the question involved.

In *United States v. Norton*, 91 U. S., 558, the Court said, by Mr. Chief Justice WAITE:

> "This is a criminal case. The motion to advance is made on behalf of the United States upon the representation of the Postmaster General, in substance, that the questions in dispute will embarrass the operations of the Government while they remain unsettled. As our rule has but recently gone into operation, we will in this case accept this statement as sufficient and grant the motion. Hereafter, motions to advance upon this ground must state facts in such a manner that we may judge whether the Government will be embarrassed in the administration of its affairs by delay."

In *Ward v. State of Maryland*, 12 Wall., 163, a motion to advance made by the plaintiff in error was denied, the Court saying:

> "Under that rule, the motion is addressed to the discretion of the Court, and inasmuch as it appears that the defendant is not in jail, the Court fails to see any reason for granting the motion."

The notice of motion served upon the attorneys

for the appellant did not disclose or purport to state the reasons upon which this application will be made, and we are entirely ignorant of the theory upon which the Government will make the request.

As a matter of fact, no reason exists for advancing the case out of its regular order on the docket. The acts alleged to have been committed by the appellant do not concern the present administration of any department or bureau of the Government. The date of the last act alleged is more than a year ago. The charge is that an investigation by special agents of the Department of the Interior was pending at some time in the past, and that the appellant paid money to certain employes of the Department for the purpose of securing early knowledge of the contents of this report. It is impossible to conceive that the administration of the business of the General Land Office or of the Department of the Interior can be embarrassed or in any respect affected by a delay of a few months in the decision of the case.

II.

The advancing of the case to an early date would seriously embarrass and prejudice the appellant.

While the appellant and his counsel have no disposition unreasonably to delay the argument of this appeal, they feel compelled to oppose this motion because the interests of the appellant would be greatly prejudiced if an early day should be fixed for the argument.

As appears by the affidavit of appellant's counsel of record submitted in opposition to this application, the record has not been printed. It is

practically impossible to begin the preparation of a brief until printed copies of the transcript of record are furnished by the Clerk. The case involves several questions of law, and the preparation for argument will necessarily require a considerable period of time.

In addition, it appears by the affidavit of appellant's counsel of record that the case was conducted and argued below by Mr. Frank H. Platt, and that Mr. Platt expects to argue this appeal, but will not have sufficiently recovered from a recent serious illness to participate in the argument before March, 1905. It appears that neither the counsel of record nor any other member of his firm is familiar with the questions involved.

It is therefore respectfully requested either that the application be denied absolutely or that, if it be granted, the case be advanced to a day calendar not earlier than some day during the month of March, 1905.

Respectfully submitted,

JAMES RUSSELL SOLEY,
Counsel for Appellant.